2. Frauds, Statute of (§ 129*)—Parol Gift of Land—Part Performance.—To uphold title to realty under a parol gift, the agreement must be certain and definite and must have been so far executed that a refusal to fully execute would be a fraud upon the donee for which he could not be compensated, and the acts of part performance must result from the agreement, and a mere general and indefinite showing that donee went into possession of a lot and made valuable improvements thereon, using and claiming it for his own openly, notoriously, continuously, and adversely for 37 years, was not sufficiently definite to sustain a claim of a parol gift of the land, especially where his possession and acts of ownership might be referred to his marital rights as tenant by the curtesy.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 287-292, 303, 306-308, 311, 314, 318-320, 322, 325, 326; Dec. Dig. § 129.* 6 Va.-W. Va. Enc. Dig. 526, 530.]

3. Lost Instruments (§ 23*)—Evidence.—Proof of the existence, loss, and contents of an alleged lost deed should be strong and conclusive to permit title to be established by parol evidence.

[Ed. Note.—For other cases, see Lost Instruments, Cent. Dig. §§ 51-57; Dec. Dig. § 23.* 9 Va.-W. Va. Enc. Dig. 479.]

4. Lost Instruments (§ 23*)—Sufficiency of Evidence.—Evidence held not to show the execution and delivery of a deed during the lifetime of the alleged grantor, which is now claimed to be lost.

[Ed. Note.—For other cases, see Lost Instruments, Cent. Dig. §§ 51-57; Dec. Dig. § 23.* 9 Va.-W. Va. Enc. Dig. 479.]

Appeal from Circuit Court, Lee County.

Suit by R. J. McLin against J. S. B. Richmond and others. From a decrée for defendant named, complainant and a part of defendants appeal. Reversed.

R. L. Pennington and *C. T. Duncan,* both of Jonesville, for appellants.

B. H. Sewell and *J. W. Orr,* both of Jonesville, for appellees.

CHESAPEAKE & O. RY. CO. *v.* McCARTHY.

Nov. 21, 1912.

[76 S. E. 319.]

1. Appeal and Error (§ 882*)—Estoppel to Allege Error.—A party, who has himself elicited the same evidence, cannot object to the admission of such evidence on behalf of the other party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.* 1 Va.-W. Va. Enc. Dig. 609.]

2. Appeal and Error (§ 1050*)—Harmless Error—Admission of Evidence.—In an action against a railroad company for injuries to a

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

fireman by jumping as his train entered an open switch, plaintiff was asked, "I understood you to say that, if the cars had been loaded and struck there, it would have done a great deal of damage," referring to the cars on the switch, to which he answered, "Well it would have done a great deal of damage." Witness had just testified that he thought his engine was running into a solid track of loaded cars, and testified on cross-examination that the passenger cars in his train would have been jammed against the tender if the engine had run into loaded freight cars, and there would have been a bad mix-up, and also testified, without objection, before the quoted question was asked, that there would have been a difference in the way his engine would have struck the cars on the switch if they had been loaded, and that the bolts and tender would have been sheared off. Held, that the company could not have been prejudiced by permitting the question and answer quoted, which was objected to as calling for a mere expression of opinion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160; Dec. Dig. § 1050.* 1 Va.-W. Va. Enc. Dig. 592.]

3. Trial (§ 296*)—Instructions—Contributory Negligence—Cure by Other Instructions.—An instruction, in a railroad fireman's action for injuries by jumping from his engine as it ran into an open switch, that plaintiff cannot recover unless the appearance of danger to him was sufficient to justify a person of reasonable firmness and prudence in believing that his safety required him to jump in order to escape the danger, and, in considering whether the appearance of danger to him was sufficient, the jury should consider his knowledge and experience as a fireman and the behavior of others, was not misleading on the ground that it fixed the circumstances as they appeared to plaintiff as a standard of judging the reasonableness of his conduct, where the court also instructed that plaintiff could not recover unless the appearances of danger to plaintiff would sufficiently justify a person of reasonable firmness and prudence in believing that his safety required him to jump from the car in order to escape the impending danger.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713 715, 716, 718; Dec. Dig. § 296.* 7 Va.-W. Va. Enc. Dig. 744.]

4. Trial (§ 295*)—Instructions—Construction.—The instructions must be read as a whole, and the verdict will not be disturbed if, when so read, they could not have mislead the jury, though one or more of them were defective.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717· Dec. Dig. § 295.* 7 Va.-W. Va. Enc. Dig. 743.]

5. Master and Servant (§ 281*)—Contributory Negligence—Sufficiency of Evidence.—Evidence in a railroad fireman's action for in-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

juries by jumping from his engine upon running into a switch held to sustain a finding that plaintiff was not negligent in failing to keep a proper lookout for signals and obstructions.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 987-996; Dec. Dig. § 281.* 9 Va.-W. Va. Enc. Dig. 705.

Error to Circuit Court, Botetourt County.

Action by D. F. McCarthy against the Chesapeake & Ohio Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. M. Perry, of Staunton, and *R. M. Parrish,* for plaintiff in error.

W. E. Allen, of Covington, for defendant in error.

POLGLAISE *v.* COMMONWEALTH.

Jan. 16, 1913.

[76 S. E. 897.]

1. Highways (§ 166*)—Regulation of Use—Validity.—Const. § 65 (Code 1904, p. ccxxiv) provides that the General Assembly may confer upon county boards of supervisors such powers of local and special legislation as it may deem expedient, not inconsistent with constitutional limitations. Act approved March 12, 1904 (Laws 1904, c. 106 [Code 1904, § 944a]), as amended by act approved March 14, 1906 (Laws 1906, c. 212), and further amended by act approved March 15, 1910 (Laws 1910, c. 226) enacted pursuant to this constitutional provision, empowers boards of supervisors to make such directions as they may deem best for working, keeping in order, and repairing of the roads and bridges of the county. While election proceedings were pending, and before there had been a vote of the people authorizing the board to make any regulation, the board of supervisors of a county coming within the provisions of such statutes adopted a regulation merely to protect highways being constructed and repaired at great cost to the public from being cut up and damaged by hauling excessive loads over them, which regulation put certain limits on the width of tires, but did not attempt to regulate the width of tires on vehicles used on "improved" highways. Held, that such regulation was not violative of a further provision of the amendatory act of 1910 that the board of supervisors shall not fix the width of tires until the question shall have been submitted to the qualified voters.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 4-57; Dec. Dig. § 166.* 3 Va.-W. Va. Enc. Dig. 667; 15 Va.-W. Va. Enc. Dig. 232.]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.